IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs May 14, 2003

STATE OF TENNESSEE v. JOHNNY DARRYL WILLIAMS-BEY

Direct Appeal from the Criminal Court for Davidson County
No. 2001-A-349 Cheryl Blackburn, Judge

No. M2002-00950-CCA-R3-CD - Filed August 21, 2003

The Defendant, Johnny Darryl Williams-Bey, was convicted by a jury of carjacking, a Class B felony. See Tenn. Code Ann. § 39-13-404(b). Following a sentencing hearing, the trial court sentenced the Defendant as a Range II offender to serve the maximum sentence of twenty years. The trial court ordered the sentence to be served consecutively to any sentence not yet served in the federal system. In this direct appeal, the Defendant raises the following six issues: (1) whether the trial court erred by denying his motion to suppress evidence of the victim's identification of the Defendant; (2) whether the trial court erred by not suppressing evidence found by the police during his arrest; (3) whether the evidence is sufficient to support his conviction for carjacking; (4) whether the trial court erred by ruling that, if the Defendant chose to testify, evidence of two prior convictions would be admissible to impeach his credibility; (5) whether the trial court effectively denied the Defendant the right to present a defense; and (6) whether the trial court erred by imposing the maximum sentence in the Defendant's range and by ordering the sentence to be served consecutively to a federal sentence. We modify the sentence to eighteen years and otherwise affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed as Modified

DAVID H. WELLES, J., delivered the opinion of the court, in which JOSEPH M. TIPTON and ALAN E. GLENN, JJ., joined.

William Jordan Steed, Nashville, Tennessee, for the appellant, Johnny Darryl Williams-Bey.

Paul G. Summers, Attorney General and Reporter; David H. Findley, Assistant Attorney General; Victor S. Johnson, District Attorney General; and Roger Moore, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

On the afternoon of January 15, 2001, Marilyn Mund went to the Officemax store on Nolensville Road in Nashville. She left the store at approximately 1:00 p.m. She walked to her car, a 1996 Acura, which was parked in the far corner of the parking lot. Ms. Mund unlocked her car, and when she reached across the seat to put her items in the car, she "felt this pair of hands on [her] shoulders." She turned around, and the man who had grabbed her shoulders pushed her onto the seat of the car. Ms. Mund testified that the man "got on top of me because he wanted to get my keys." Ms. Mund began to scream, but no one was able to see or hear her because a van was parked between her and the storefront. Eventually, the man wrestled Ms. Mund's keys from her. He said to her, "If you cooperate I won't hurt you." At that point, the man got Ms. Mund out of the car, and he got in the driver's seat. He had some difficulty starting the car, and Ms. Mund opened the car door to get her purse. The man then got out of the car and pushed Ms. Mund down onto the pavement. He got back in, started the car, and "sped away right down Nolensville Road."

Ms. Mund went back to Officemax, where she found a person with a cellular phone who called the police. Police officers arrived shortly thereafter, and Ms. Mund gave them a description of her assailant. Doctors subsequently determined that Ms. Mund suffered a cracked pelvis and a broken rib during the attack. The next day, Detective Warren of the Nashville Police Department went to Ms. Mund's house to show her a photographic lineup. From the lineup, she identified the Defendant as the man who took her car. Based upon this identification, Detective Warren obtained an arrest warrant charging the Defendant with carjacking.

Officer Mark Anderson testified that he came into contact with the Defendant during the early morning hours of January 16, 2001. The Defendant had been stopped by another officer, and Officer Anderson arrived shortly thereafter. The Defendant was driving a mid-1980s Buick, and he was unable to produce a driver's license. Officer Anderson began to search the vehicle because it was going to have to be towed. In the back seat of the car he found a white plastic bag from Officemax and Ms. Mund's black purse. Another officer later located Ms. Mund's car in an apartment complex parking lot not far from where the Defendant was stopped.

The Defendant called as a witness Kimberly Buckner, who worked at the Tennessee Department of Safety. She testified that the license plate bearing number APS-059, which was on the car the Defendant was driving when he was stopped by the police, was registered to an Eric D. Jamison. The plate was assigned to a blue 1984 Oldsmobile Cutlass, not a white 1987 Oldsmobile Cutlass.[1]

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[1]There is a conflict in the testimony regarding what type of vehicle the Defendant was driving when he was stopped by the police. Officer Anderson testified at trial that he was driving a mid-1980s Buick. However, Officer Nelson testified at the suppression hearing that he was driving a white, 1987 Oldsmobile Cutlass. Furthermore, the prosecutor asked Ms. Buckner to what kind of car the license plate was registered, and she testified it was registered to a blue, 1984 Oldsmobile Cutlass. The prosecutor then asked, "So, this tag does not go to the 1987, Olds Cutlass, two door, white?" Ms. Buckner replied, "It's registered to an '84 Olds Cutlass." Regardless of the discrepancy, it is clear

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PHOTOGRAPHIC LINE-UP

The Defendant's first argument on appeal is that the trial court erred by denying his motion to suppress evidence of the victim's identification of the Defendant because the photographic lineup shown to the victim was impermissibly suggestive. In order to show a due process violation arising out of an impermissibly suggestive lineup, the Defendant must show that the lineup presented to Ms. Mund was "so impermissibly suggestive as to give rise to 'a very substantial likelihood of irreparable misidentification.'" Forbes v. State, 559 S.W.2d 318, 322 (Tenn. 1977) (quoting Simmons v. United States, 390 U.S. 377, 384, 88 S. Ct. 967, 19 L. Ed. 2d 1247 (1968).

The Defendant contends that the photographic lineup was impermissibly suggestive for three reasons. First, the Defendant was one of only three men in the six-photo array who had on dark clothing. Ms. Mund testified that her attacker wore dark clothing. In support of his theory that the lineup was impermissibly suggestive due to the clothing worn by the men depicted in the photographs, the Defendant cites the following dialogue at the trial:

> Defense counsel: "And if you remember, that person number one, had on dark clothing?"
> Ms. Mund: "Yes."
> Defense counsel: "As did two other people in that six person spread?"
> Ms. Mund: "Yes. But their faces didn't look anything like his. So, that was the difference. That's why I chose number one over the other two."

The Defendant argues that this colloquy indicates that Ms. Mund considered only the men who wore dark clothing in the photo array. We disagree. Ms. Mund, responding to a direct question by defense counsel, explained why she chose the Defendant over the other two men who had on dark clothing. She made her decision based upon the men's faces. We are not persuaded that the lineup was impermissibly suggestive based upon the clothes worn by the men in the photographs, especially in light of the fact that the only clothing visible in the photos is the collars of the men's shirts.

Second, the Defendant maintains that the photographic lineup was impermissibly suggestive because Ms. Mund was shown a separate photograph depicting just the Defendant. At the suppression hearing, both Detective Warren and Ms. Mund testified that the six photographs in the lineup were the only pictures that Ms. Mund viewed. However, at trial, Ms. Mund had the following exchange with defense counsel:

> Defense counsel: "And [Detective Warren] brought you the sheet that you testified about with the six pictures in it?"
>
> Ms. Mund: "Yes, sir."
> Defense counsel: "That was the only sheet of pictures that he gave you?"

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[1](...continued)
that the license plate on the car the Defendant was driving when he was stopped by the police was not registered to that vehicle.

> Ms. Mund: "No. I think I had one of Mr. Williams-Bey, a separate one with just his picture on it."

However, when defense counsel asked whether she viewed the photograph of the Defendant before she viewed the lineup, Ms. Mund answered, "I had the six pictures first. And then when I identified the first one then he gave me a print out of all the information." There is no indication that Ms. Mund viewed a separate photograph of the Defendant before she examined the lineup. Rather, she testified that it was after she viewed the lineup and identified the Defendant as her attacker that she was given an individual picture of the Defendant. The picture of the Defendant that Ms. Mund viewed after she identified him in the lineup would not have rendered the lineup impermissibly suggestive.

Finally, the Defendant asserts that the lineup was impermissibly suggestive because Ms. Mund knew that police had someone in custody at the time she viewed the lineup. The record is unclear with respect to whether Ms. Mund knew that someone was in custody at the time she viewed the lineup. At the hearing on the Defendant's motion to suppress, Ms. Mund testified that she found out her purse had been recovered between two and four days after her car was taken. Detective Warren testified that he did not tell Ms. Mund that someone had been taken into custody at the time she viewed the lineup. He was unsure whether Ms. Mund knew at that time that her purse had been recovered. However, Ms. Mund testified at trial that she received a call from the police late at night on the day her car was stolen, and she was informed at that time that her purse had been recovered. Ms. Mund also testified at trial that she assumed that the police had taken someone into custody when she viewed the photographic array and that he would be in the array. A few questions later, Ms. Mund stated that she learned on the night before Detective Warren came to see her that the police had taken a suspect into custody.

> When reviewing the grant or denial of a motion to suppress,
> [q]uestions of credibility of the witnesses, the weight and value of the evidence, and resolution of conflicts in the evidence are matters entrusted to the trial judge as the trier of fact. The party prevailing in the trial court is entitled to the strongest legitimate view of the evidence adduced at the suppression hearing as well as all reasonable and legitimate inferences that may be drawn from that evidence. So long as the greater weight of the evidence supports the trial court's findings, those findings shall be upheld.

State v. Odom, 928 S.W.2d 18, 23 (Tenn. 1996). At the conclusion of the hearing, the trial judge noted the victim's clear opportunity to view her assailant, that the victim "obviously paid attention to what he looked like," and that the victim was "absolutely certain, was certain at the time of the identification and is certain in court today." In overruling the motion to suppress, the trial judge stated, "[s]o I'm going to find that clearly this is not a suggestive lineup such that it needs to be suppressed." We conclude that the greater weight of the evidence supports the trial court's findings.

Even if the lineup were impermissibly suggestive for any of the reasons raised by the Defendant, the totality of the circumstances surrounding the identification supports the admission of Ms. Mund's identification of the Defendant. In Neil v. Biggers, 409 U.S. 188, 199, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972), the United States Supreme Court set forth five factors to consider in determining whether an identification is admissible after an impermissibly suggestive lineup. Those factors are: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' description; (4) the witness' level of certainty; and (5) the time between the crime and the confrontation. See id.; Forbes, 559 S.W.2d at 323.

Ms. Mund testified that her encounter with the Defendant occurred very quickly. However, she explicitly stated that she "really did study his face very thoroughly and [she] was thinking about having to identify him." The victim was not able to accurately estimate the Defendant's height and weight,[2] but we note that, during her encounter with the Defendant, she was pinned underneath him and wrestling for her keys, which could have inhibited her ability to gauge his overall size. With respect to Ms. Mund's level of certainty of her attacker, she testified that there was no doubt in her mind that it was the Defendant who took her car. Detective Warren testified that, upon viewing the photo lineup, Ms. Mund "picked him really quick . . . she immediately went to number one and said, 'That's him.'" Ms. Mund identified the Defendant from the lineup at around 6:00 p.m. on January 16, 2001, approximately thirty hours after her car was stolen. Accordingly, we conclude that the trial court did not err by denying the Defendant's motion to suppress the evidence of Ms. Mund's identification. This issue is without merit.

VALIDITY OF STOP

The Defendant's second issue is whether the trial court erred by not suppressing evidence found by the police as a result of his arrest. Specifically, he argues that the officer who stopped him did not possess reasonable suspicion that the Defendant had committed a crime; therefore, Ms. Mund's purse and the bag from Officemax, which were found as a result of that stop, should have been excluded at trial.

Police may constitutionally initiate an investigatory stop of an automobile if they have reasonable suspicion, supported by specific and articulable facts, that the occupant of the vehicle has either committed a criminal offense or is about to commit a criminal offense. See State v. Simpson, 968 S.W.2d 776, 780 (Tenn. 1998). When evaluating whether a police officer's reasonable suspicion is supported by specific and articulable facts, a court must consider the totality of the circumstances. See State v. Watkins, 827 S.W.2d 293, 294 (Tenn. 1992). Our supreme court has held that "[u]pon turning on the blue lights of a vehicle, a police officer has clearly initiated a stop and has seized the subject of the stop within the meaning of the Fourth Amendment of the Federal Constitution and Article I, section 7 of the Tennessee Constitution." State v. Binette, 33 S.W.3d 215, 218 (Tenn. 2000) (citing State v. Pulley, 863 S.W.2d 29, 30 (Tenn. 1993)). Therefore, the question for our

[2]The victim described her assailant as 5'6" to 5'7" in height, stocky, and weighing 170 pounds. Detective Warren's report characterizes the Defendant as 5'10" in height and weighing 200 pounds.

review is whether the officer who stopped the Defendant had reasonable suspicion that the Defendant had committed a crime at the time the officer activated his blue lights.

Officer Mark Nelson testified at the suppression hearing that, on January 16, 2001, he was on patrol in south Nashville. He was working in a high-crime area when he noticed a white, 1987 Oldsmobile Cutlass. He stated that the driver of the car appeared to be either looking for someone or lost. The driver was pulling into closed businesses, turning around in parking lots, driving slow and then speeding up. At one point, the driver drove through the parking lot of a hotel where drugs are known to be sold, looking back and forth. Officer Nelson testified that, during the two weeks prior to January 16, there had been several robberies involving cars similar to the one he noticed. Based on what he had observed, Officer Nelson decided to check the license tag on the vehicle through his dispatcher. His dispatcher responded that the license tag did not belong on that vehicle.[3] Therefore, Officer Nelson activated his emergency equipment and stopped the vehicle. As a result of the stop, Ms. Mund's purse and shopping bag were recovered from the back seat of the vehicle, which the Defendant was driving.

We conclude that the trial court did not err by refusing to suppress the evidence obtained by the police during the Defendant's arrest. Given the totality of the circumstances surrounding the stop - the Defendant's erratic driving in a high-crime area and the fact that the license plate on the car was registered to a different vehicle - we find that Officer Nelson's suspicion that some criminal activity may have been afoot was reasonable. It was at least reasonably suspect that the Defendant was driving a vehicle with an improper license plate. This issue is without merit.

SUFFICIENCY

Next, the Defendant contends that the evidence is not sufficient to support his conviction for carjacking. Tennessee Rule of Appellate Procedure 13(e) prescribes that "[f]indings of guilt in criminal actions whether by the trial court or jury shall be set aside if the evidence is insufficient to support the findings by the trier of fact of guilt beyond a reasonable doubt." Evidence is sufficient if, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. See Jackson v. Virginia, 443 U.S. 307, 319 (1979); State v. Smith, 24 S.W.3d 274, 278 (Tenn. 2000). In addition, because conviction by a trier of fact destroys the presumption of innocence and imposes a presumption of guilt, a convicted criminal defendant bears the burden of showing that the evidence was insufficient. See McBee v. State, 372 S.W.2d 173, 176 (Tenn. 1963); see also State v. Buggs,

[3] The Defendant cites Williams v. State, 506 S.W.2d 193 (Tenn. Crim. App. 1973), in which this Court held that information from the police dispatcher that the license plate on a vehicle was not registered to that vehicle was "pure hearsay" and was insufficient to support probable cause. However, this case is more akin to State v. Rhymer, 915 S.W.2d 465 (Tenn. Crim. App. 1995), in which the issue was not probable cause for arrest, but reasonable suspicion for an investigatory stop. In Rhymer, this Court held that an N.C.I.C. report which showed that the registration of the defendant's vehicle was issued to another vehicle could form the basis for reasonable suspicion. The Defendant attempts to distinguish Rhymer by pointing out that, in that case, the information relied upon was received via N.C.I.C. computer, whereas in this case, the information came through police dispatch. We are unpersuaded by this argument.

995 S.W.2d 102, 105-06 (Tenn. 1999); State v. Evans, 838 S.W.2d 185, 191 (Tenn. 1992); State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982).

In its review of the evidence, an appellate court must afford the State "the strongest legitimate view of the evidence as well as all reasonable and legitimate inferences that may be drawn therefrom." Tuggle, 639 S.W.2d at 914; see also Smith, 24 S.W.3d at 279. The court may not "re-weigh or re-evaluate the evidence" in the record below. Evans, 838 S.W.2d at 191; see also Buggs, 995 S.W.2d at 105. Likewise, should the reviewing court find particular conflicts in the trial testimony, the court must resolve them in favor of the jury verdict or trial court judgment. See Tuggle, 639 S.W.2d at 914. All questions involving the credibility of witnesses, the weight and value to be given the evidence, and all factual issues are resolved by the trier of fact, not the appellate courts. See State v. Morris, 24 S.W.3d 788, 795 (Tenn. 2000); State v. Pappas, 754 S.W.2d 620, 623 (Tenn. Crim. App. 1987).

Carjacking is defined as "the intentional or knowing taking of a motor vehicle from the possession of another by use of . . . [f]orce or intimidation." Tenn. Code Ann. § 39-13-404(a)(2). Ms. Mund testified that a man, whom she later positively identified as the Defendant, pushed her into her car as she was attempting to leave the Officemax parking lot. The Defendant got on top of her and wrestled her keys from her. He then pushed her down onto the pavement and drove away in her car. During the course of the attack, Ms. Mund suffered a cracked pelvis and a broken rib. Early in the morning on the next day, the Defendant was stopped by the police. Ms. Mund's purse and the Officemax shopping bag she had been carrying the day before were discovered in the back seat of the car the Defendant was driving. Clearly this evidence is sufficient to support the Defendant's conviction for carjacking beyond a reasonable doubt; therefore, this issue is without merit.

ADMISSIBILITY OF PRIOR CONVICTIONS

In his fourth issue on appeal, the Defendant argues that the trial court erred by ruling that, if the Defendant chose to testify, evidence of two prior convictions would be admissible for impeachment purposes. The Defendant had a 1991 federal conviction for armed bank robbery and a 1981 conviction for bank robbery. The Defendant filed motions to exclude this evidence because, given the similarity between the prior convictions and the offense charged, the admission of the prior convictions would result in undue prejudice outweighing their probative value. The Defendant also pointed out that the 1981 conviction was outside the ten-year limit set forth in Tennessee Rule of Evidence 609(b). The trial court denied the Defendant's motions with respect to both prior convictions; however, the trial court stated that it would reconsider its ruling with respect to the 1981 bank robbery conviction after it heard the proof.[4]

[4]The Defendant contends that the trial court erred by failing to rule on the admissibility of the 1981 conviction before the Defendant proffered his testimony. Tennessee Rule of Evidence 609(a)(3) states, in pertinent part, "The court may rule on the admissibility of [prior convictions] prior to the trial but in any event shall rule prior to the testimony of the accused." (Emphasis added). A review of the record reveals that the trial court did issue a ruling on the admissibility of the 1981 conviction before the Defendant testified. The court stated, "At this point I am going to say that the probative value outweighs its prejudicial effect. I will however, listen to the proof and reconsider it at the time." Although the trial (continued...)

The Defendant chose not to testify but made an offer of proof outside the presence of the jury. He stated that, on the day of the carjacking, he was looking for work at a company called Labor Ready. Because no work was available, the Defendant lingered around Labor Ready until approximately 3:00 p.m. At that time, he accompanied his friend Eric Jamison on a quest to exchange stolen credit cards for cash. This pursuit occupied much of the Defendant's afternoon and evening. The Defendant drove Mr. Jamison's car, a white Oldsmobile Cutlass, in his attempt to locate a buyer for the credit cards. The Defendant was driving this car when he was stopped by the police early on the morning of January 16, 2001. He stated that, at that time, he had no knowledge of the carjacking and had never seen the victim.

In ruling against the Defendant, the trial court noted that the Defendant's testimony essentially presented an alibi defense of which there was no evidence aside from his word. Therefore, the Defendant's credibility was a crucial issue. Based on the importance of the Defendant's credibility, the trial court found that the probative value of the conviction for armed bank robbery, which is a crime involving dishonesty, outweighed the potential for unfair prejudice. The trial court also held that the probative value of the 1981 bank robbery conviction substantially outweighed the risk of unfair prejudice.

The Tennessee Rules of Evidence allow the State to use a judgment of conviction to impeach the testimony of a defendant. See Tenn. R. Evid. 609. However, Rule 609 sets forth several conditions which must be satisfied to allow for such impeachment. Among these conditions are the following:

> (2) The crime must be punishable by death or imprisonment in excess of one year under the law under which the witness was convicted or, if not so punishable, the crime must have involved dishonesty or false statement.
> (3) If the witness to be impeached is the accused in a criminal prosecution, the State must give the accused reasonable written notice of the impeaching conviction before trial, and the court upon request must determine that the conviction's probative value on credibility outweighs its unfair prejudicial effect on the substantive issues. The court may rule on the admissibility of such proof prior to the trial but in any event shall rule prior to the testimony of the accused. If the court makes a final determination that such proof is admissible for impeachment purposes, the accused need not actually testify at the trial to later challenge the propriety of the determination.

Tenn. R. Evid. 609(a)(2)-(3).

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[4](...continued)
court did reconsider and affirm its ruling after the Defendant testified, the trial court sufficiently complied with Rule 609(a)(3) by ruling that the probative value of the 1981 conviction outweighed its prejudicial effect.

> In determining whether the probative value of a conviction on the issue of credibility outweighs its unfair prejudicial effect on the substantive issues, two criteria are especially relevant. A trial court should first analyze the relevance the impeaching conviction has to the issue of credibility . . . . If the conviction is probative of the defendant's credibility, the trial court should secondly assess the similarity between the crime on trial and the crime underlying the impeaching conviction.

State v. Mixon, 983 S.W.2d 661, 674 (Tenn. 1999) (citation omitted); see also State v. Farmer, 841 S.W.2d 837, 839 (Tenn. Crim. App. 1992). If more than ten years have elapsed from the date of release from confinement or the date of conviction if there was no confinement, then evidence of a prior conviction is generally not admissible. See Tenn. R. Evid. 609(b). However, evidence of such a remote conviction may be admissible if the proponent of the evidence gives the adverse party advance notice of intent to use the evidence and the court determines "in the interests of justice that the probative value of the conviction, supported by specific facts and circumstances, substantially outweighs its prejudicial effect." Id. On appellate review, the trial court's rulings on the admissibility of prior convictions for impeachment purposes will only be reversed for an abuse of discretion. See Mixon, 983 S.W.2d at 675; State v. Blanton, 926 S.W.2d 953, 960 (Tenn. Crim. App. 1996).

In this case, the State sought to admit the Defendant's prior convictions for bank robbery and armed bank robbery for impeachment purposes. Robbery is a crime involving dishonesty. See State v. Galmore, 994 S.W.2d 120, 122 (Tenn. 1999); State v. Caruthers, 676 S.W.2d 935, 941 (Tenn. 1984). Obviously, the probative value of a prior conviction involving dishonesty is significant with respect to the issue of credibility. As the trial court correctly noted, had the Defendant testified, his credibility would have been a key issue because his testimony would have been the only evidence that he was at Labor Ready at the time of the carjacking. Therefore, the Defendant's 1991 conviction for armed bank robbery was highly probative on the issue of the Defendant's credibility.

The Defendant's 1981 conviction for bank robbery was several months outside the ten-year limit of Tennessee Rule of Evidence 609(b). The date that the Defendant was released from confinement for the 1981 conviction was March 6, 1990. The Defendant was arrested on January 16, 2001. However, because robbery is a crime involving dishonesty, and the Defendant's credibility was of great significance, the probative value of this conviction is also high.

The Defendant argues that both his armed bank robbery conviction and his bank robbery conviction were highly prejudicial because bank robbery and armed bank robbery are similar in nature to carjacking. The Defendant cites the danger of allowing the jury to hear evidence of the Defendant committing a crime similar to the one for which he is on trial, that is, "that since the defendant committed a similar offense, he or she is probably guilty of the offense charged." Mixon, 983 S.W.2d at 674. The fact that the Defendant's prior convictions for armed bank robbery and bank robbery are similar to carjacking in that they both involve the forced taking of someone else's property does not automatically bar the use of the convictions to impeach him as a witness. See

State v. Miller, 737 S.W.2d 556, 560 (Tenn. Crim. App. 1987). Where, as here, credibility is a key issue, this Court has upheld the admission of evidence of prior convictions involving dishonesty, even where the prior convictions are similar in nature to the subject of the appeal. See, e.g., State v. Montea Wilson, No. W2000-00748-CCA-R3-CD, 2002 WL 925255, at *14 (Tenn. Crim. App., Jackson, May 3, 2002); State v. Michael Pittman, No. W2000-01027-CCA-R3-CD, 2001 WL 589162, at *4-6 (Tenn. Crim. App., Jackson, May 31, 2001). We conclude that the trial judge did not abuse her discretion by ruling that the probative value of the armed bank robbery conviction outweighed its prejudicial effect.

However, for evidence of the 1981 conviction to be admissible under Rule 609(b), the trial court must determine that the probative value of the conviction substantially outweighs the risk of unfair prejudice. "Convictions over ten years old have been held to be admissible where they show a continuing course of criminal conduct probative of credibility." Caruthers, 676 S.W.2d at 941; see also Johnson v. State, 596 S.W.2d 97, 104 (Tenn. Crim. App. 1979). Had the Defendant testified, his credibility would have been crucial, and, although the 1981 bank robbery conviction is outside the ten-year limit, it does show a continuing course of criminal conduct which involves dishonesty. We are therefore unable to say that the trial judge abused her discretion by ruling that the 1981 conviction would be admissible for impeachment purposes. Moreover, even if we were to determine that the trial court did abuse its discretion by ruling that either or both of the convictions should be admissible, the error is harmless under the circumstances of this case, as the proof of the Defendant's guilt is strong. See Tenn. R. Crim. P. 52(a). Therefore, this issue is without merit.

RIGHT TO PRESENT A DEFENSE

The Defendant's next issue is whether the trial court effectively denied the Defendant the right to present a defense. He argues two main points. First, he asserts that the trial court erred by refusing to admit the death certificate of Eric Jamison, the man who owned the license plate that was on the car the Defendant was driving when he was stopped by the police. The trial court was of the opinion that the death certificate was not relevant to the issue of whether the Defendant forcefully took Ms. Mund's car. The record reflects that counsel for the defense at trial withdrew his motion to admit the death certificate. Therefore, this issue has been waived. See Tenn. R. App. P. 36(a).

Second, the Defendant complains that he was not allowed to properly cross-examine Officer Nelson, the police officer who stopped the Defendant early on the morning of January 16, 2001. First of all, neither the State nor the Defendant called Officer Nelson as a witness at trial. He did testify at the suppression hearing, and defense counsel attempted to cross-examine him concerning Officer Nelson allegedly being charged with burglarizing another officer's home. The trial court ruled at the suppression hearing that conduct which occurred five months after the instant offense and had not yet resulted in a conviction was not relevant. The Defendant now contends that Officer Nelson was a critical witness. However, the Defendant fails to explain what the testimony of this officer would have been and how it would have affected his defense or the jury's verdict. The officer's testimony was limited to the evidence found in the vehicle the Defendant was driving when he was stopped. For this reason and because the Defendant failed to call Officer Nelson as a witness at trial, this issue has no merit.

Because we find that the Defendant has waived the issue of the admissibility of the death certificate and that the issue of the cross-examination of Officer Nelson is without merit, the Defendant's argument that he was denied the right to present a defense gains him no relief.

SENTENCING

Finally, the Defendant asserts that the trial court erred by imposing the maximum sentence in the Defendant's range and by ordering the sentence to be served consecutively to a federal sentence. When an accused challenges the length, range, or manner of service of a sentence, this Court has a duty to conduct a de novo review of the sentence with a presumption that the determinations made by the trial court are correct. See Tenn. Code Ann. § 40-35-401(d). This presumption is "conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991).

When conducting a de novo review of a sentence, this Court must consider: (a) the evidence, if any, received at the trial and sentencing hearing; (b) the presentence report; (c) the principles of sentencing and arguments as to sentencing alternatives; (d) the nature and characteristics of the criminal conduct involved; (e) any statutory mitigating or enhancement factors; (f) any statement made by the defendant regarding sentencing; and (g) the potential or lack of potential for rehabilitation or treatment. See Tenn. Code Ann. §§ 40-35-102, -103, -210; State v. Brewer, 875 S.W.2d 298, 302 (Tenn. Crim. App. 1993); State v. Thomas, 755 S.W.2d 838, 844 (Tenn. Crim. App. 1988).

If our review reflects that the trial court followed the statutory sentencing procedure, that the court imposed a lawful sentence after having given due consideration and proper weight to the factors and principles set out under the sentencing law, and that the trial court's findings of fact are adequately supported by the record, then we may not modify the sentence even if we would have preferred a different result. See State v. Pike, 978 S.W.2d 904, 926-27 (Tenn. 1998); State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

In this case, the presentence report reflects that, at the time of sentencing, the Defendant was forty years old and divorced. He dropped out of high school after the eleventh grade, but he completed his G.E.D. while he was in prison. The only employment history reflected in the presentence report consists of a four-month period of working for Service Merchandise, two months working for a company called DMI, and six months working as a loader for Sears. The Defendant's entire employment history as set forth in the presentence report lasted from December 1, 1998 through September 30, 1999. In addition to the 1981 bank robbery conviction and the 1991 armed bank robbery conviction, for which the Defendant was on federal supervised release at the time he committed the instant offense, the Defendant was also convicted of the casual exchange of a controlled substance on January 24, 2001, possession of drug paraphernalia on January 24, 2001, and use of a firearm in commission of a crime of violence on February 5, 1991. Furthermore, the Defendant admitted to using marijuana two to three times per week from the time he was thirteen or fourteen years old until he was incarcerated for the instant offense.

At the sentencing hearing, Officer Charles Hoffman testified that, during the search of the Defendant incident to his arrest on January 16, 2001, he found on the Defendant a small bag of marijuana and a glass vial, commonly used to smoke crack cocaine. Thus, the Defendant was convicted of possession of a controlled substance and possession of drug paraphernalia on January 24, 2001.

Ms. Mund testified at the sentencing hearing regarding the nature of her injuries.[5] She testified that, although she did not experience significant pain immediately after the Defendant threw her onto the pavement, gradually the pain increased. She went to Southern Hills Hospital, where x-rays revealed that she had a cracked pelvis and a broken rib. Although she took pain medication for only "a couple of days," she testified that it took her two and a half months to completely recover. During that time, she was able to use a walker to get around, but she "was pretty much home in the bed until [she] recovered."

Lorinda McKinney, the Defendant's ex-wife, testified on the Defendant's behalf. Ms. McKinney was married to the Defendant for approximately eight months from November of 1989 to June of 1990. She testified that the Defendant had been in and out of prison in the time she had known him. She stated that she was surprised to learn of the Defendant's convictions because she had "never seen him act that way." She testified that he worked when he could, and he was a loving father who provided financial help when he could. On cross-examination, Ms. McKinney stated that she met the Defendant while he was in prison and she was doing volunteer work.

After establishing that the Defendant possessed two prior felony convictions, the trial court properly determined that the Defendant was a Range II offender. A Range II offender convicted of carjacking, a Class B felony, is subject to a sentence of between twelve and twenty years in confinement. See Tenn. Code Ann. § 40-35-112(b)(2). In determining the appropriate sentence for the Defendant, the trial court found three enhancement factors: (1) the Defendant had a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range; (2) the personal injuries inflicted upon Ms. Mund by the Defendant were particularly great; and (3) the Defendant committed the carjacking while on federal supervised release. See Tenn. Code Ann. § 40-35-114(2), (7), (14) (Supp. 2002). The trial court found no mitigating factors. At the conclusion of the sentencing hearing, the trial court imposed the maximum sentence in the Defendant's range and ordered the sentence to be served consecutively to any time to be served in the federal system.

The Defendant's challenge to his sentence is twofold. First, he contends that the trial court imposed an excessive sentence based upon the erroneous application of the three enhancement factors and an improper refusal to apply one mitigating factor.

The trial court enhanced the Defendant's sentence because the Defendant had a previous history of criminal convictions or criminal behavior in addition to those necessary to establish him

[5] We note that Ms. Mund was sixty-one years old at the time of the sentencing hearing.

as a Range II offender. See Tenn. Code Ann. § 40-35-114(2) (Supp. 2002). The Defendant asserts that the trial court erred by considering conduct that occurred after the carjacking, namely his convictions for possession of a controlled substance and possession of drug paraphernalia. The Defendant's argument is misplaced. This Court has previously held that trial judges may properly consider criminal convictions or any other criminal behavior which occurred prior to the sentencing hearing as constituting "a previous history of criminal convictions or criminal behavior" under Tennessee Code Annotated section 40-35-114(2), regardless of whether the convictions or behavior occurred before or after the criminal conduct under consideration. See, e.g., State v. Ed Waters, No. 01-C-019106CR00158, 1992 WL 28457, at *3 (Tenn. Crim. App., Nashville, Feb. 20, 1992). Furthermore, the Defendant admitted to using marijuana two to three times per week from the time he was thirteen or fourteen years old, and at the time he was arrested, he said he was involved in an attempt to sell credit cards for cash. The trial court did not err in applying this enhancement factor.

The trial court also found that the Defendant inflicted particularly great personal injuries to Ms. Mund. See Tenn. Code Ann. § 40-35-114(7) (Supp. 2002). The Defendant contends that the injuries suffered by Ms. Mund do not constitute "particularly great" injuries. We note that proof of serious bodily injury will always constitute proof of particularly great injury. See State v. Jones, 883 S.W.2d 597, 602 (Tenn. 1994). Our code defines serious bodily injury as bodily injury involving a substantial risk of death, protracted unconsciousness, extreme physical pain, protracted or obvious disfigurement, or protracted loss or substantial impairment of a function of a bodily member, organ, or mental faculty. See Tenn. Code Ann. § 39-11-106(a)(34). In this case, Ms. Mund testified that she suffered protracted loss of movement as a result of the Defendant throwing her to the ground. She stated that her recovery lasted two and a half months, and she was bedridden much of that time. We think this is sufficient to constitute serious bodily injury, which in turn constitutes particularly great injury. See Jones, 883 S.W.2d at 602. Therefore, the trial court did not err in applying this enhancement factor.

The third enhancement factor applied by the trial court was that the Defendant committed the carjacking while on federal supervised release. See Tenn. Code Ann. § 40-35-114(14) (Supp. 2002). The Defendant argues that federal supervised release does not fall within one of the forms of release status set forth in enhancement factor (14), which include bail, parole, probation, work release, or any other type of release into the community under the direct or indirect supervision of the department of correction or local government authority. See id.

> First, we must analyze the nature of federal supervised release.
> Supervised release is a new form of post-imprisonment supervision that was created by the Sentencing Reform Act. It accompanied implementation of the Sentencing Guidelines. Unlike parole, a term of supervised release does not replace a portion of the sentence of imprisonment, but rather is an order of supervision in addition to any term of imprisonment imposed by the court. Thus, supervised release is a method of post-incarceration supervision and a transformation of probation from a suspension of sentence to a sentence in itself. There is an inherent difference between probation and supervised release. When probation is revoked for a violation, the rules set forth

> in 18 U.S.C. § 3565 limit the term of resentencing to the term allowable under the original offense . . . . By contrast, a violation of supervised release may result in a cumulative punishment that exceeds the original prison sentence. Under the new system of supervised release, it is possible that an individual will have already served the maximum prison sentence allowed under the guidelines before his supervised release even begins. Thereafter, a violation of that supervised release, even in the final days of the release period, could result in additional prison time.

U.S. v. Reese, 71 F.3d 582, 587-88 (6th Cir. 1995) (citations omitted).

In Tennessee, as in the federal system, when a court revokes a defendant's probation, the sentence imposed may not exceed the remainder of the full sentence. See Tenn. Code Ann. § 40-35-306(b). The Sixth Circuit Court of Appeals noted that a violation of supervised release, unlike a violation of probation, can result in additional time to serve. See Reese, 71 F.3d at 588. Furthermore, supervised release, unlike probation, does not involve a suspension of a sentence; rather, supervised release is a sentence unto itself. See id. at 587. Therefore, federal supervised release is not akin to probation for the purposes of enhancement factor (14).

Likewise, in Tennessee, parole is "the release of a prisoner to the community . . . prior to the expiration of such prisoner's term." Tenn. Code Ann. § 40-28-102(5). Federal supervised release, unlike parole, "does not replace a portion of the sentence of imprisonment." Reese, 71 F.3d at 587. Rather, it is an order of supervision in addition to the term of imprisonment. See id. Therefore, federal supervised release is not analogous to parole for enhancement purposes.

Clearly the Defendant was not released on bail or pursuant to a work release program. Consequently, we turn to subsection (E) of enhancement factor (14), which provides for the enhancement of the sentence of a defendant who committed a felony while on "[a]ny other type of release into the community under the direct or indirect supervision of the department of correction or local governmental authority." While we acknowledge that this subsection is a catchall provision, it does not allow for the enhancement of a defendant's sentence where the defendant was on federal supervised release. Subsection (E) explicitly states that, for it to be applicable, the release must be under the supervision of the department of correction or local government authority, which the Defendant's sentence of supervised release was not. Accordingly, federal supervised release does not fit into any of the categories set forth in Tennessee Code Annotated section 40-35-114(14), and we therefore must conclude that the trial court erred by applying that enhancement factor.

The Defendant also contends that the trial court erred by not finding any mitigating factors. Specifically, the Defendant alleges that, based on the testimony of the Defendant's ex-wife, the court should have applied Tennessee Code Annotated section 40-35-113(13), which allows for mitigation based on "[a]ny other factor consistent with the purposes of this chapter." Ms. McKinney testified that the Defendant was a loving father who provided support when he could. However, she acknowledged that the Defendant had been in and out of prison and that it had been at least a year and a half since the Defendant had been employed. We have already discussed the Defendant's

criminal history and his poor work history. The trial court did not err by refusing to find any mitigating factors.

Although we find that the trial court erred by applying enhancement factor (14), we conclude that the court did properly apply enhancement factors (2) and (7). The trial judge stated that she placed great weight on factors two and fourteen. Because we find the trial court erred in applying factor (14), we conclude a modification of the sentence is appropriate. The remaining enhancement factors are sufficient to justify a sentence near the maximum in the Defendant's range. We conclude that the Defendant's sentence should be modified from twenty years to eighteen years.

Finally, the Defendant argues that the trial court erred by ordering his sentence to be served consecutively to any federal sentence not yet served.[6] The Defendant directs our attention to Tennessee Code Annotated section 40-35-115(b), which lists factors that would justify the imposition of consecutive sentencing. He argues that the trial court erred by finding that the Defendant is a professional criminal who has devoted his life to criminal acts as a major source of livelihood and that his record of criminal activity is extensive. See id. § 40-35-115(b)(1)-(2).

The record reflects the Defendant's prior convictions for bank robbery and armed bank robbery, use of a firearm in the commission of a crime of violence, casual exchange of a controlled substance, and possession of drug paraphernalia. At the time of his arrest, the Defendant was admittedly involved in some sort of criminal episode involving the sale or use of stolen credit cards.

Although we believe the record in this case supports the trial court's findings, we also address the Defendant's issue by observing that Tennessee Rule of Criminal Procedure 32(c)(2) states in pertinent part,

> If the defendant has additional sentences or portions thereof to serve, as the result of conviction in other states or in federal court, the sentence imposed shall be consecutive thereto unless the court shall determine in the exercise of its discretion that good cause exists to run the sentences concurrently and explicitly so orders.

To the extent that the Defendant has yet to serve any portion of his federal sentence, the trial court did not err in ruling that the sentence in this case shall run consecutively thereto.[7] This issue is without merit.

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[6] The record reflects that on February 5, 1991, the Defendant was sentenced by the U.S. District Court to forty-one months for armed bank robbery and five years consecutive for use of a firearm in commission of a crime of violence. However, the record does not reflect how long the Defendant was to remain on federal supervised release, which is a form of punishment separate from the incarceration period that attaches to the original offense. See Reese, 71 F.3d at 588.

[7] The record is unclear regarding federal time the Defendant has yet to serve. The presentence report indicates that a federal detainer was pending against the Defendant at the time of sentencing.

The Defendant's sentence is modified to eighteen years. In all other respects, the judgment is affirmed.

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DAVID H. WELLES, JUDGE